

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CAROL J. NELSON,) CIVIL NO. 01-00182 KSC
)
Plaintiff,) ORDER GRANTING IN PART AND
) DENYING IN PART
vs.) PLAINTIFF'S MOTION FOR
) AWARD OF ATTORNEY'S FEES
ROBERT ALAN JONES,)
)
Defendant.)
_____)
)
)
ROBERT ALAN JONES,)
)
Counterclaimant,)
)
vs.)
)
CAROL J. NELSON,)
)
Counterclaim)
Defendant.)
_____)

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY'S FEES

Before the Court is Plaintiff/Counterclaim Defendant Carol Nelson's ("Plaintiff") Motion for Award of Attorney's Fees ("Motion"), filed December 31, 2007. Prior to the filing of the Motion, Plaintiff filed two identical Statements of Consultation on December 11 and

December 20, 2007. On January 14, 2008, Defendant/Counterclaim Plaintiff Robert Alan Jones ("Defendant") filed an Opposition. Plaintiff filed a Reply on January 28, 2008.

Pursuant to Local Rule 7.2(d) of the Local Rules of Practice of the United States District Court for the District of Hawaii ("Local Rules"), the Court finds this matter suitable for disposition without a hearing. After careful consideration of the Motion, the supporting and opposing memoranda, and the relevant case law, the Court GRANTS IN PART AND DENIES IN PART Plaintiff's Motion and awards Plaintiff \$51,986.00 in attorneys' fees.

BACKGROUND

On February 13, 2001, Plaintiff filed a Complaint in the Third Circuit, State of Hawaii, for Summary Possession, Ejectment and Damages. On March 23, 2001, Defendant removed the case to this Court on the basis of diversity jurisdiction.

On April 2, 2001, Defendant filed his Answer and a Counterclaim Joining Additional Counterclaim

Defendants. On October 10, 2001, Defendant filed a Second Amended Counterclaim and added additional Counterclaim Defendants.

On February 19, 2003, Chief United States District Judge Helen Gillmor entered an Order Granting Plaintiff Carol J. Nelson's and Counterclaim Defendant Michael Cetraro's Motion for Summary Judgment and for Expungement of Lis Pendens Filed August 28, 2002 ("February 19, 2003 Order"). In the February 19, 2003 Order, Judge Gillmor granted Nelson and Counterclaim Defendant Michael Cetraro's ("Cetraro") motion for summary judgment as to Count I (summary possession) and Count III (declaratory relief) of Plaintiff's Complaint. February 19, 2003 Order at 46. The Court declared that Plaintiff was the legal owner of the subject condominium located in Kona, Hawaii. Id. The Court also granted Plaintiff's and Cetraro's motion for summary judgment as to Counterclaims I-VIII of Defendant's Second Amended Counterclaim. Id.

Defendant appealed the February 19, 2003 Order granting summary judgment in favor of Nelson and

Cetraro as to Count I (summary possession) and Count III (declaratory relief) of Plaintiff's Complaint. See Order Clarifying Remaining Parties and Claims filed April 26, 2006 ("April 26, 2006 Order") at 2.

On June 27, 2003, Plaintiff dismissed the remaining claims in her Complaint: Counts II, IV, V, and VI. Id. at 2.

On January 18, 2005, the Ninth Circuit Court of Appeals entered an Order Vacating and Remanding as to the Court's February 19, 2003 Order. Id. at 3; Nelson v. Jones, No. 03-16542, 2005 WL 89421 (9th Cir. Jan. 18, 2005).

On January 24, 2006, Defendant filed a motion for clarification as to the remaining parties and claims. On April 26, 2006, the Court issued an Order Clarifying Remaining Parties and Claims. The Court construed the Ninth Circuit Order to indicate that only Plaintiff's 1) summary possession and 2) declaratory relief claims and Defendant's 1) breach of contract, 2) breach of contract for specific performance, and 3) declaratory relief counterclaims were reinstated and

found that the remaining counterclaims in Defendant's Second Amended Counterclaim were not at issue. Therefore, the Court held that this matter would proceed to trial on the following issues: 1) whether the parties entered into an Agreement of Sale with respect to the Kona, Hawaii condominium; 2) if so, whether the Agreement of Sale is enforceable; and 3) who has the right to possession and ownership of the Kona, Hawaii condominium.

This matter came on for bench trial on August 7 8, and 9, 2007. On August 31, 2007, the Court issued its Findings of Fact and Conclusions of Law. The Court found in Plaintiff's favor on her summary possession and declaratory relief claims. Further, the Court held that Plaintiff was entitled to judgment as to Defendant's breach of contract and declaratory relief counterclaims. The Court determined that Defendant's breach of contract for specific performance counterclaim was rendered moot by the sale of the subject condominium to an unrelated party during the pendency of the action. On September 6, 2007, the

Court entered judgment in Plaintiff's favor.

On September 18, 2007, Plaintiff filed a motion for award of attorney's fees. The Court denied said motion without prejudice on October 10, 2007 due to Plaintiff's failure to timely file a statement of consultation and for non-compliance with Local Rule 54.3(d).

Plaintiff now moves for \$77,832.49 in attorneys' fees, which she allegedly incurred in defending against Defendant's assumpsit counterclaim.

DISCUSSION

A federal court sitting in diversity must apply state law in determining whether the prevailing party is entitled to attorneys' fees. See Farmers Ins. Exch. v. Law Offices of Conrado Joe Sayas, Jr., 250 F.3d 1234, 1236 (9th Cir. 2001). Under Hawaii law, "[o]rdinarily, attorneys' fees cannot be awarded as damages or costs unless so provided by statute, stipulation, or agreement." Stanford Carr Dev. Corp. v. Unity House, Inc., 111 Hawai'i 286, 305, 141 P.3d 459, 478 (2006) (citation and quotation marks omitted).

A. Timeliness of Motion

Motions for attorneys' fees and costs "must be filed no later than 14 days after entry of judgment[.]" Fed. R. Civ. P. 54(d)(2)(B); see also Local Rule 54.3(a). "Rule 54(a) defines 'judgment' as including 'any order from which an appeal lies' and 'posits a relationship between a judgment and its appealability.' Pavlovich v. Nat'l City Bank, 461 F.3d 832, 836 (6th Cir. 2006) (quoting Castro County, Texas v. Crespin, 101 F.3d 121, 128 (D.C. Cir. 1996)). The Court entered judgment on September 6, 2007. On September 18, 2007, Plaintiff timely filed her first motion for award of attorneys' fees. Because the Court denied the motion without prejudice and did not establish a deadline for filing another motion, the Court considers the instant Motion timely filed under the rules.

B. Applicability of Hawaii Revised Statutes § 607-14

Plaintiff seeks an award of fees pursuant to Hawaii Revised Statutes ("HRS") § 607-14, which states, in pertinent part:

In all the courts, in all actions in the

nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that the attorney representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.

Haw. Rev. Stat. § 607-14. A court awarding attorneys' fees pursuant to § 607-14 must apportion the fees claimed between assumpsit and non-assumpsit claims, if practicable. See Blair v. Ing, 96 Hawai'i 327, 332, 31 P.3d 184, 189 (2001).

1. Prevailing Party

Recognizing that HRS § 607-14 only provides a basis for attorneys' fees with respect to claims that are in the nature of assumpsit, Plaintiff argues that

she is the prevailing party as to Defendant's breach of contract counterclaim, pursuant to the Judgment entered on September 6, 2007. The Hawaii courts have noted that "'[i]n general, a party in whose favor judgment is rendered by the district court is the prevailing party in that court, plaintiff or defendant, as the case may be. . . .'" MFD Partners v. Murphy, 9 Haw. App. 509, 514, 850 P.2d 713, 716 (1992) (quoting 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 54.70[4], at 54-323-54-324, (2d ed. 1992)) (some alterations in original); see also Village Park Cmtv. Ass'n v. Nishimura, 108 Hawai'i 487, 503, 122 P.3d 267, 283 (Haw. Ct. App. 2005).

Insofar as the Court entered final judgment in Plaintiff's favor and against Defendant with respect to all claims on remand, including the breach of contract counterclaim, Plaintiff is the prevailing party.

2. Nature of the Counterclaim

The Court's next inquiry is whether Defendant's breach of contract counterclaim is in the nature of assumpsit. Defendant argues that the original basis

for his counterclaims was an action in equity for specific performance, with the nature of the claims changing only after the granting of summary judgment.

"Assumpsit is a common law form of action which allows for the recovery of damages for non-performance of a contract, either express or implied, written or verbal, as well as quasi contractual obligations." 808 Dev., LLC v. Murakami, 111 Hawai'i 349, 366, 141 P.3d 996, 1013 (2006) (citation, emphases, and quotation marks omitted). "'[T]he nature of a claim' is 'determined from the substance of the entire pleading, the nature of the grievance, and the relief sought, rather than from the formal language employed or the form of the pleadings.'" S. Utsunomiya Enters, Inc. v. Moomuku Country Club, 76 Hawai'i 396, 400, 879 P.2d 501, 505 (1994). For a claim to be in the nature of assumpsit, "the plaintiff's primary objective must be to obtain monetary relief for breach of the contract." Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, 151 P.3d 732, 761 (Haw. 2007).

In the present case, the breach of contract

counterclaim is in the nature of assumpsit. Clearly, Defendant's primary objective was to obtain monetary relief for his allegation of breach. He sought \$311,329.96 in damages for breach of contract. Thus, Plaintiff is entitled to attorneys' fees with respect to Defendant's breach of contract counterclaim.

C. Calculation of Fees

Given that Plaintiff is entitled to fees incurred in defending against Defendant's breach of contract counterclaim, the Court now turns to the amount of the entitlement.

Hawaii courts calculate reasonable attorneys' fees based on a method that is virtually identical to the traditional "lodestar" calculation set forth in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). See DFS Group L.P. v. Paiea Props., 110 Hawai'i 217, 222, 131 P.3d 500, 505 (2006). The court must determine a reasonable fee by multiplying the number of hours reasonably expended by a reasonable hourly rate. See id. at 222-23, 131 P.3d at 505-06. In addition, Hawaii courts may consider the following factors:

(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client.

Chun v. Bd. of Trs. of Employees' Ret. Sys. of Hawai'i, 106 Hawai'i 416, 435, 106 P.3d 339, 358 (2005) (citations omitted). These factors, however, are merely guides; courts need not consider them in every case. See id. In certain types of cases, some of these factors may justify applying a multiplier to the "lodestar" amount. See Chun v. Bd. of Trs. of Employees' Ret. Sys. of Hawai'i, 92 Hawai'i 432, 442, 992 P.2d 127, 137 (2000).

Plaintiff requests \$77,832.49 in attorneys'

fees. This amount reflects 25% of the \$311,329.96 in damages requested by Defendant. See Haw. Rev. Stat. § 607-14 ("The above fees provided for by this section shall be assessed . . . upon the amount sued for if the defendant obtains judgment."). Plaintiff claims to have actually incurred \$78,660.00¹ defending against the counterclaims and preparing this Motion. The breakdown of this total is as follows: 1) \$20,680 (\$51,700.00 x 40%) - Plaintiff incurred \$51,700.00 in fees from September 1, 2001 to July 17, 2003 and Mr. Painter determined that only 40% of the billings were dedicated to the defense of the counterclaims; 2) \$55,540.00 - fees incurred during the remanded phase of this action, all of which are attributable to the counterclaims; and 3) \$2,440.00 - fees incurred for the preparation of this Motion.

As an initial matter, the Court notes that

¹ Plaintiff actually requests \$82,942.19. However, Plaintiff's calculations appear to be incorrect, based on the billing statements submitted as Exhibit A. Thus, the Court's calculations will hereinafter serve as the requested amount of fees.

Plaintiff is not entitled to the fees incurred from September 1, 2001 to July 17, 2003. Federal Rule of Civil Procedure 54(d) requires that motions for attorneys' fees be filed no later than 14 days after the entry of judgment. The Court originally entered judgment in Plaintiff's favor on July 17, 2003. Plaintiff failed to file a motion for attorneys' fees within 14 days following the entry of judgment. Therefore, to the extent that this Motion seeks fees incurred in litigating the case prior to the 2003 entry of judgment, it is untimely. The Court will accordingly limit its review to the fees requested for the remand phase of the action.

1. Reasonable Hourly Rate

Plaintiff's counsel requests a \$200 hourly rate. The Hawaii courts consider the reasonable hourly rate in a manner virtually identical to the traditional lodestar formulation and some courts have considered federal law in determining a reasonable hourly rate. See, e.g., Reiche v. Ferrera, No. 24449, 2003 WL 139608, at *8 (Hawai'i Ct. App. Jan. 16, 2003) ("The

reasonable hourly rate is that prevailing in the community for similar work." (citing United States v. Metro. Dist. Comm'n, 847 F.2d 12, 19 (1st Cir. 1988)). But see DFS Group, 110 Hawai'i at 223, 131 P.3d at 506 (determining a reasonable hourly rate by calculating the average of the four requested rates). This Court therefore finds that federal case law on the determination of a reasonable hourly rate is instructive in the instant case.

In determining what is a reasonable hourly rate, the experience, skill, and reputation of the attorney requesting fees are taken into account. See Webb v. Ada County, 285 F.3d 829, 840 & n.6 (9th Cir. 2002). The reasonable hourly rate should reflect the prevailing market rates in the community. See id.; Gates v. Deukmejian, 987 F.2d 1392, 1405 (9th Cir. 1992), as amended on denial of reh'q, (1993) (noting that the rate awarded should reflect "the rates of attorneys practicing in the forum district"); see also Chun, 106 Hawai'i at 435, 106 P.3d at 358 (listing "the customary charges of the Bar for similar services" as a

factor that may be considered). It is the burden of the fee applicant to produce satisfactory evidence, in addition to an affidavit from the fee applicant, demonstrating that the requested hourly rate reflects prevailing community rates for similar services. See Jordan v. Multnomah County, 815 F.2d 1258, 1263 (9th Cir. 1987).

Mr. Painter has been a member of the Hawaii Bar since 1979. Mr. Painter represents that since January 1, 2002, he has billed at an hourly rate of \$250, and that both the United State Bankruptcy Court and this Court have awarded fees based on said rate. See Mot., Declaration of Enver Painter, Jr. ("Painter Decl.") at 2-3. He also declares that this rate is commensurate with his experience and expertise and is comparable to the rates charged by other attorneys in this community with similar experience. Id. at 3. Despite this fact, Mr. Painter bases the fee request on \$200 hourly rate given the 2001 fee agreement he entered into with Plaintiff. Id.

This Court is well aware of the prevailing

rates in the community for similar services performed by attorneys of comparable experience, skill and reputation. Based on this Court's knowledge of the community's prevailing rates, the hourly rates generally granted by the Court, the Court's familiarity with this case, and Mr. Painter's submissions, this Court finds that Mr. Painter's \$200 hourly rate is manifestly reasonable.

2. Reasonable Hours Spent

For the reasoning stated in Section C.1, this Court finds federal case instructive on the issue of the reasonable number hours expended on the instant case. Beyond establishing a reasonable hourly rate, a prevailing party seeking attorneys' fees bears the burden of proving that the fees and costs taxed are associated with the relief requested and are reasonably necessary to achieve the results obtained. See Tirona v. State Farm Mut. Auto. Ins. Co., 821 F. Supp. 632, 636 (D. Haw. 1993) (citations omitted); see also Sharp v. Hui Wahine, 49 Haw. 241, 247, 413 P.2d 242, 246 (1966) (the party requesting fees has the burden to

prove that the requested fees were reasonably and necessarily incurred). The court must guard against awarding fees and costs which are excessive, and must determine which fees and costs were self-imposed and avoidable. See Tirona, 821 F. Supp. at 637 (citing INVST Fin. Group v. Chem-Nuclear Sys., 815 F.2d 391, 404 (6th Cir. 1987), cert. denied, 484 U.S. 927 (1987)). Courts have the "discretion to 'trim fat' from, or otherwise reduce, the number of hours claimed to have been spent on the case." Soler v. G & U, Inc., 801 F. Supp. 1056, 1060 (S.D.N.Y. 1992) (citation omitted). Time expended on work deemed "excessive, redundant, or otherwise unnecessary" shall not be compensated. See Gates, 987 F.2d at 1399 (quoting Hensley, 461 U.S. at 433-34).

Plaintiff represents that all of the fees incurred from December 2005 to August 2007 can be attributed to the counterclaim. The billing statements indicate that Mr. Painter expended 27.6 hours on Case Development, Investigation, and Administration; 12.4 hours on Pleadings; 25.4 hours on Motions Practice; 6.3

hours on Attending Court Hearings; 162.5 hours on Trial Preparation; and 43.5 hours on Post-Trial Motions Pleadings, for a total of 277.7 hours.

Defendant does not entirely oppose the request for fees related to the issues on remand. However, he argues that the fees should be reduced to \$30,630.00 in order to apportion between the assumpsit and non-assumpsit claims. Defendant proposes the following breakdown of fees: 50% of trial costs, or \$16,250.00; 20% of motions costs, or \$3,240.00; and \$9,480.00 for case development.

In cases involving both assumpsit and non-assumpsit claims, "a court must base its award of fees, if practicable, on an apportionment of the fees claimed between assumpsit and non-assumpsit claims." TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 264, 990 P.2d 713, 734 (Haw. 1999) (citation omitted). In conducting this analysis, the court must determine whether each individual claim alleged in the complaint sounds in assumpsit or in tort and apportion fees between the assumpsit and non-assumpsit claims if practicable.

Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 885 (D. Haw. 2000). However, in some cases it may be impracticable or impossible to apportion fees. See, e.g., Blair, 96 Hawai'i at 333, 31 P.3d at 190 ("Because the negligence claim in this case was derived from the alleged implied contract and was inextricably linked to the implied contract claim by virtue of the malpractice suit, we hold that it is impracticable, if not impossible, to apportion the fees between the assumpsit and non-assumpsit claims."). Thus, under Blair, a court may award reasonable attorneys' fees pursuant to HRS § 607-14 to a party who succeeds on a contract claim that is "inextricably linked" to a tort claim, and decline to apportion fees. Id.

Here, four claims/counterclaims were before the Court on remand: 1) summary possession; 2) declaratory relief; 3) breach of contract, 4) breach of contract for specific performance; and 5) declaratory relief. Trial proceeded on three issues: 1) whether the parties entered into an Agreement of Sale with respect to the Kona, Hawaii condominium; 2) if so, whether the

Agreement of Sale is enforceable; and 3) who has the right to possession and ownership of the Kona, Hawaii condominium.

As the Court previously determined, the breach of contract counterclaim is in the nature of assumpsit. However, the remaining claims seek equitable relief and are not in the nature of assumpsit. Despite this fact, the Court is unable to apportion the fees between the assumpsit and the non-assumpsit claims. In the present case, the issues on remand were inextricably intertwined and it would be impractical, if not impossible, for the Court to apportion the hours expended on the breach of contract counterclaim alone. This is particularly so because the breach of contract claim was dependent on whether a contract existed and if it existed, whether it was enforceable. Accordingly, the Court declines to apportion the fees between the assumpsit and non-assumpsit claims.

However, after carefully reviewing Plaintiff's time submissions, the Court finds that some reductions are appropriate, especially with respect to the

requested hours that are recorded in the "block billing" style. "The term 'block billing' refers to the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." Robinson v. City of Edmond, 160 F.3d 1275, 1284 n.9 (10th Cir. 1998) (citations and quotation marks omitted). Block billing entries generally fail to specify a breakdown of the time spent on each task.

District courts have the authority to reduce hours that are billed in block format because such a billing style makes it difficult for courts to ascertain how much time counsel expended on specified tasks. Welch v. Metropolitan Life Ins. Co., 480 F.3d 942, 948 (9th Cir. 2007). See also id. (citing Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 971 (D.C. Cir. 2004) (reducing requested hours because counsel's practice of block billing "lump[ed] together multiple tasks, making it impossible to evaluate their reasonableness"); see also Hensley, 461 U.S. at 437

(holding that applicant should "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims")). Indeed, it is a challenge to determine the reasonableness of a time entry when it includes several tasks.

In the present case, Mr. Painter has block-billed nearly all of his time entries. The Court is therefore unable to ascertain how he apportioned his time between various tasks listed under a single time entry. This makes it difficult, if not impossible, for the Court to determine the reasonableness of the hours expended. As such, the Court finds that an across-the-board reduction of 10% is appropriate. The Court declines to impose a greater reduction in light of the under-market hourly rate that Mr. Painter has applied to his billings. A 10% reduction of the 277.7 hours expended during the remand phase of the case results in a total of 249.93 hours, which the Court finds reasonable.

Plaintiff lastly seeks fees for the preparation of the initial attorneys' fees motion. She argues that

her counsel expended 12.2 hours in researching and preparing for the same. However, she did not submit any documentation to support her request. For this reason, the Court finds that a 2.2 hour reduction is appropriate and that the resulting 10 hours expended on the motion for attorneys' fees was manifestly reasonable. In sum, the Court finds that Plaintiff's counsel reasonably expended 259.93 hours in this action.

3. Total Fee Award

Based on the foregoing, the Court awards Plaintiff \$51,986.00 (259.93 hours x \$200 hourly rate). These fees are permissible under HRS § 607-14 because they do not exceed 25% of the judgment, or in this case, the amount of damages sought by Defendant. In his modified proposed conclusion of law #44, filed on August 6, 2007, Defendant represented that he suffered damages totaling \$311,329.96. Twenty-five percent of this is \$77,832.49. Thus, the \$51,986.00 award falls well below the 25% limitation imposed by HRS § 607-14.

CONCLUSION

In accordance with the foregoing, the Court
HEREBY GRANTS IN PART AND DENIES IN PART Plaintiff's
Motion for Award of Attorney's Fees, filed December 31,
2007, and awards \$51,986.00 in attorneys' fees to
Plaintiff.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, January 31, 2008.





Kevin S.C. Chang
United States Magistrate Judge

CIVIL NO. 01-00182 KSC; NELSON V. JONES, ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY'S FEES